EDITOR'S NOTE

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87-6703

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

FEBRUARY TERM, 1988

DOUGLAS VINCENT METHENY,

Petitioner,

vs.

M. C. HAMBY, WARDEN; and
WILLIAM M. LEECH, ATTORNEY GENERAL
FOR THE STATE OF TENNESSEE,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION TO PROCEED IN FORMA PAUPERIS

Comes now the Petitioner, Douglas Vincent Metheny, and would state and show to the Court that a Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit has previously been lodged with the Clerk of the Court.

At the time the Petition was submitted, counsel for the Petitioner failed to point out that from the District Court level that counsel has been appointed under the Criminal Justice Act of 1964 as amended.

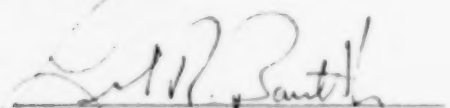
All appearances, both in the United States District Court for the Middle District of Tennessee and in the United States Court of Appeals for the Sixth Circuit, have been made by appointed counsel.

Accordingly, pursuant to the provisions of Rule 46 of the Supreme Court Rules and U.S.C. §3006A that the Petition for Writ of Certiorari be allowed to be filed with no filing fee being required for the reasons set forth in this Motion.

Undersigned counsel certifies that all statements contained in this Motion are true and accurate.

Respectfully submitted,

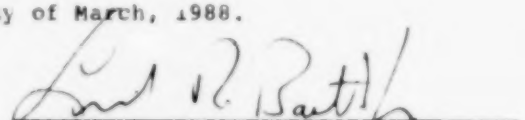
LIONEL R. BARRETT, JR., P.C.
Fifth Floor
207 Third Avenue, North
Nashville, Tennessee 37201
(615) 254-1471

BY: 
LIONEL R. BARRETT, JR.

CERTIFICATE OF SERVICE

I hereby certify that two true and exact copies of the foregoing Motion have been provided to Mr. Wayne E. Uhl, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219.

On this the 28th day of March, 1988.


LIONEL R. BARRETT, JR.

No. 87-6709

IN THE

SUPREME COURT OF THE UNITED STATES

FEBRUARY TERM, 1988

DOUGLAS VINCENT METHENY,

Petitioner,

vs.

M.C. HAMBY, WARDEN; and
WILLIAM M. LEECH, ATTORNEY GENERAL
FOR THE STATE OF TENNESSEE,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LIONEL R. BARRETT, JR., P. C.
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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in holding that, in the absence of exceptional circumstances, a claimed violation of Article IV(e) of the Interstate Agreement on Detainers (IAD) is not a fundamental defect which is cognizable under 28 U.S.C. 2254.

LIST OF ALL PARTIES TO PROCEEDINGS BELOW

The caption of the case in this Court contains the names of all parties to the appeal to the United States Court of Appeals for the Sixth Circuit.

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Miscellaneous

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IN THE

SUPREME COURT OF THE UNITED STATES

FEBRUARY TERM, 1988

No. _____

DOUGLAS VINCENT METHENY,

Petitioner,

vs.

M.C. HAMBY, WARDEN; and
WILLIAM M. LEECH, ATTORNEY GENERAL
FOR THE STATE OF TENNESSEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The Petitioner, Douglas Vincent Metheny, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on December 22, 1987.

OPINION BELOW

On December 22, 1987, the United States Court of Appeals for the Sixth Circuit upheld the denial of his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. 2254. The Petitioner, while in State custody as a result of felony convictions, had filed the Petition claiming that Tennessee had violated the trial - before - return provision of Article IV(e) of the IAD by returning him to Federal custody from State custody without proceeding to trial on the State charges. A copy of the Decision of the Sixth Circuit is attached. (Appendix A-1).

STATEMENT OF JURISDICTION

This Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit arises from a Decision by that Court of December 22, 1987. This Court has jurisdiction to review the judgment by Writ of Certiorari pursuant to 28 U.S.C. 1254(1). See Supreme Court Rule 17.1(a), (c).

STATUTORY PROVISIONS INVOLVED

This Petition almost exclusively Article IV(e) of the Interstate Agreement on Detainers. That section is as follows:

> If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such

> indictment, information or complaint shall not be of any further force or effect, and the Court shall enter an order dismissing the same with prejudice.

In this particular case the provision appears as §40-31-101 of the Tennessee Code Annotated (1982).

STATEMENT OF THE CASE

The Petitioner, Douglas Vincent Metheny, while in State custody, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. 2254. The Petitioner claimed that he was entitled to the granting of the Writ since the State of Tennessee had violated the trial - before - return provisions of Article IV(e) of the Interstate Agreement on Detainers by returning him to Federal custody from State custody without proceeding to trial on the State charges.

The Federal District Court denied relief and with Court-appointed counsel the Petitioner appealed to the United States Court of Appeals for the Sixth Circuit. It is from the decision of that Court that this Petition is based.

REASONS FOR GRANTING CERTIORARI

This case presents an area of the law that apparently does need to have a clear and final adjudication. As will be set forth in the Argument portion of this Petition, there does appear to be a split in the Circuit Courts with at least two Circuits adopting a position that would be favorable to the Petitioner herein and disagreeing with the conclusion of the Sixth Circuit.

Accordingly, it does appear that pursuant to Rule 17.1(a) that this Federal Court of Appeals decision is in conflict with the decision of another Federal Court of Appeals on the same matter and, accordingly, the Petition for Writ of Certiorari should be granted.

ARGUMENT

The decision of the Sixth Circuit Court does adequately outline the issues involved in this matter and does recognize that there is a split of authority in the Courts of Appeals.

There is no question that the Interstate Agreement on Detainers, which is authorized by the Compact Clause of the United States Constitution, Article I, Section 10, Cl. 3, is a "law of the United States" and therefore subject to Federal construction. There is no question now but that the IAD is a Federal law.

This Court has in general held that not every asserted error of law may be cognizable in a Habeas Corpus proceeding. Davis v. United States, 417 U.S. 333, 94 S.Ct. 2298, (1974). In Mars v. United

States, 615 F.2d 704 (6th Cir. 1980), cert. denied, 449 U.S. 849 (1980), the Sixth Circuit held that a violation of the IAD was not cognizable under 22 U.S.C. 2255 where a Federal prisoner sought post conviction relief on the basis of a violation by the government of Article IV(e) of the IAD. The Court held that the inmate's claim was not cognizable under 28 U.S.C. 2255 because the claimed error was not a fundamental defect which inherently resulted in a complete miscarriage of justice and did not present exceptional circumstances where the need for the remedy afforded by the Writ of Habeas Corpus was apparent.

In the instant case the Sixth Circuit felt that since the error claimed by the State Petitioner Metheny rose to a no higher level of seriousness than that claimed by Hers, that a determination should be made if a different standard

should be applied solely because Metheny was in State custody seeking Federal Habeas Corpus relief. The Sixth Circuit also held that the relief available to the State prisoner under 28 U.S.C. 2254:

> "Is narrower in scope, since it provides only for habeas corpus relief when custody is in violation of the Constitution, laws, or treaties of the United States. Accordingly, principals of comity dictate that a higher standard of cognizability be required of errors alleged where prisoners who are incarcerated as a result of state court proceedings, especially when one considers that a state prisoner has had available to him state post conviction procedures." (Metheny v. Hamby - p.4 of Decision).

In the opinion of the Sixth Circuit cases are cited from the First, Second, Fourth, Eighth, Ninth and Tenth Circuits. It is recognized that decisions in the Seventh Circuit and Third Circuit are contrary to the decision of the Sixth

Circuit. In the middle ground would be the Ninth Circuit, which holds that a violation of the IAD time provisions is a cognizable defect. Tinghitella v. California, 718 F.2d 308 (9th Cir. 1983).

The Seventh Circuit seems to be at odds with the decision of the Sixth Circuit as evidenced by Echevarria v. Bill, 579 F.2d 1022 (7th Cir. 1978).

The Third Circuit Court of Appeals has firmly held that all IAD violations are potentially cognizable in collateral proceedings. In United States v. Williams, 615 F.2d 585, 589 - 590 (3rd Cir. 1980), the Court noted that Congress had provided that timely raised violations of the IAD rendered an entire prosecution dismissible. Thus, Congress indicated its intent that all clear violations of the IAD be treated as "fundamental defects".

The Third Circuit's position on the issue explains in part why the issue was not specifically addressed by this Court in Carchman v. Nash, ____ U.S. ____, 105 S.Ct. 3401, 87 L.Ed.2d 516 (1985), a case which came out of the Third Circuit. In granting the Writ of Habeas Corpus, the District Court briefly noted the cognizability of IAD violations in the Third Circuit and cited United States v. Williams, supra.

On appeal the issue of cognizability may not have been clearly raised since the issue was deemed clearly settled in the Third Circuit. See Nash v. Jeffes, 739 F.2d 878 (3rd Cir. 1984). The history of the Carchman litigation indicates that the "fundamental defect" issue may not have been clearly raised on appeal. It cannot be disputed, however, but that the Court's language in

Carchman, supra, indicates that the preliminary ruling on cognizability recognized that the IAD is a Federal law subject to Federal construction.

The decision of the Sixth Circuit that is the subject of this Appeal relied to some extent upon the fact that the Third Circuit recently held that not all violations of the IAD are "fundamental defects" and thus cognizable under 28 U.S.C. 2254. Casper v. Ryan, 822 F.2d 1283 (3rd Cir. 1987). In that case, however, the Court stated:

> "We are bound by our holding in Williams and Esola that a violation of the anti-shuttling provision of the IADA may warrant habeas relief, even without a showing of prejudice." Casper v. Ryan, 822 F.2d at 1289.

That Court also recognizes the similar authority of Webb v. Keohane, 804 F.2d 413 (7th Cir. 1986). (Violation of

Article IV(e) trial - before - return provision cognizable in a Federal Habeas Petition.)

It should further be pointed out that at least two members of this Court seem to consider the issue to remain unresolved as indicated by a dissenting opinion written three months after the decision in Carchman, supra. Kerr v. Finkbeiner, ____ U.S. ____, 106 S.Ct. 263 (1985). (White and Marshall, J.J. dissenting from the denial of certiorari.)

CONCLUSION

For the above-stated reasons, the Petitioner respectfully requests the Court to issue a Writ of Certiorari to the Court of Appeals for the Sixth Circuit remanding the case for further argument as to whether or not the State of Tennessee violated the IAD and, if so, whether or not the Petitioner may have waived any violation.

Respectfully submitted,

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RECOMMENDED FOR FULL TEXT PUBLICATION
See. Sixth Cir. Rule 24

No. 86-5974

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DOUGLAS VINCENT METHENY,
Petitioner-Appellant,

v.

M.C. HAMBY, WARDEN; and WILLIAM M. LEECH, ATTORNEY GENERAL OF THE STATE OF TENNESSEE,
Respondents-Appellees.

ON APPEAL from the United States District Court for the Middle District of Tennessee.

Decided and Filed December 22, 1987

Before: JONES and NORRIS, Circuit Judges; and PECK, Senior Circuit Judge.

ALAN E. NORRIS, Circuit Judge. Petitioner, Douglas Metheny, while in state custody as the result of felony convictions, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Metheny claimed that he was entitled to a writ since the state of Tennessee had violated the trial-before-return provision of Article IV(e) of the Interstate Agreement on Detainers ("IAD") by returning him to federal custody from state custody without proceeding to trial on the

state charges. He appeals the denial of his petition by the district court.

The threshold issue for our determination is whether Metheny's claimed violation of the IAD is cognizable under 28 U.S.C. § 2254. For if his claim is not cognizable, then the district court should be affirmed and we need not reach the other questions raised in the appeal—whether the state actually violated the IAD and, if so, whether Metheny waived any violation.

Metheny claimed that the state violated Article IV(e) of the IAD by returning him to federal custody from state custody on several occasions without proceeding to trial on the state charges. Custody had been obtained by the state for proceedings preliminary to trial, pursuant to writs of habeas corpus *ad prosequendum* directed to federal prison authorities. The federal government is a party to the IAD. Metheny argued that Tennessee, also a party to the IAD, had lodged a detainer against him with federal authorities as contemplated by the Agreement, and that the state's conduct violated Article IV(e):

> If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Tenn. Code Ann. § 40-31-101 (1982).

In *Mars* v. *United States*, 615 F.2d 704 (6th Cir. 1980), *cert. denied*, 449 U.S. 849 (1980), we held that violation of the IAD was not cognizable under 28 U.S.C. § 2255, where a federal prisoner sought postconviction relief on the basis of a violation by the United States of Article IV(e) of the IAD. Mars was serving a prison term in Michigan when the govern-

ment directed a detainer against him to state corrections officials. After he was indicted on federal charges, he was taken into federal custody pursuant to a writ of habeas corpus *ad prosequendum*, and returned a week later without having been tried. He was subsequently taken into federal custody again to be tried, and was convicted.

Relying upon the Supreme Court's opinion in *Davis v. United States*, 417 U.S. 333 (1974), we held that Mars' claim was not cognizable under 28 U.S.C. § 2255 because the claimed error was not a fundamental defect which inherently results in a complete miscarriage of justice, and did not present exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent. 615 F.2d at 707.

Because the error claimed by Metheny rises to no higher a level of seriousness than that claimed by Mars, we must determine if a different standard should be applied in this appeal solely because Metheny is in state custody and seeks federal habeas corpus relief under 28 U.S.C. § 2254.

We discern no reason to apply a higher standard than the one set out in *Davis*, and which we applied in *Mars* to a federal prisoner seeking relief under 28 U.S.C. § 2255. Certainly, considerations of comity and federalism argue for that result. *See Francis v. Henderson*, 425 U.S. 536, 541-42 (1976). The Supreme Court has on numerous occasions commented upon similarities between the relief available under 28 U.S.C. § 2255 and habeas corpus, noting that 28 U.S.C. § 2255 provides to the sentencing court the remedies which are available by habeas corpus in the court of the district where the prisoner is confined. *See, e.g., Davis v. United States*, 417 U.S. at 343-44; *Hill v. United States*, 368 U.S. 424, 427 (1962); *Heflin v. United States*, 358 U.S. 415 (1959), concurring opinion of five Justices at 421; *United States v. Hayman*, 342 U.S. 205, 219 (1952). Because 28 U.S.C. § 2255 is "the modern postconviction procedure available to federal prisoners,"

Stone v. Powell, 428 U.S. 465, 479 (1976), and therefore offers a wide range of postconviction relief remedies, the relief available to a state prisoner under 28 U.S.C. § 2254 is narrower in scope, since it provides only for habeas corpus relief when custody is in violation of the Constitution, laws, or treaties of the United States. Accordingly, principles of comity dictate that a higher standard of cognizability be required of errors alleged by prisoners who are incarcerated as the result of state court proceedings, especially when one considers that a state prisoner has had available to him state postconviction procedures. *See* 428 U.S. 465; *Niziolek v. Ashe*, 694 F.2d 282 (1st Cir. 1982).

Our conclusion, that Metheny's claim of a state violation of Article IV(e) of the IAD is not cognizable under 28 U.S.C. § 2254, is supported by positions taken by the First Circuit in *Fasano v. Hall*, 615 F.2d 555 (1st Cir. 1980), *cert. denied*, 449 U.S. 867 (1980), the Fourth Circuit in *Kerr v. Finkbeiner*, 757 F.2d 604 (4th Cir. 1985), *cert. denied*, 474 U.S. 929 (1985) and *Bush v. Muncy*, 659 F.2d 402 (4th Cir. 1981), *cert. denied*, 455 U.S. 910 (1982), and the Ninth Circuit in *Carlson v. Hong*, 707 F.2d 367, 368 (9th Cir. 1983), *but cf. Tinghitella v. California*, 718 F.2d 308 (9th Cir. 1983) (violation of IAD time provisions is a cognizable defect). In addition, three other circuits have concluded that, in the absence of exceptional circumstances, violation of the IAD is not cognizable under 28 U.S.C. § 2255: *Edwards v. United States*, 564 F.2d 652 (2d Cir. 1977); *Huff v. United States*, 599 F.2d 860 (8th Cir. 1979), *cert. denied*, 444 U.S. 952 (1979); *Greathouse v. United States*, 655 F.2d 1032 (10th Cir. 1981), *cert. denied*, 455 U.S. 926 (1982).

Opinions of other circuits are cited as having arrived at a contrary conclusion. However, the Seventh Circuit, in arriving at that conclusion in *Webb v. Keohane*, 804 F.2d 413 (7th Cir. 1986) and *Echevarria v. Bill*, 579 F.2d 1022 (7th Cir. 1978), did not undertake the two-step analysis we found mandatory in *Mars*, and which also has been utilized by the

First, Second, Fourth, Eighth, Ninth, and Tenth Circuits in the cases cited above. The courts in the Seventh Circuit cases satisfied the first step of the analysis by determining that the IAD is a law of the United States for purposes of federal habeas corpus jurisdiction. However, the Supreme Court has cautioned that the inquiry should not stop there, since not every asserted error of federal law can be raised on a request for habeas corpus relief. Instead, it must be determined that the claimed error is a fundamental defect which inherently results in a complete miscarriage of justice and presents exceptional circumstances where the need for the remedy afforded by habeas corpus is apparent. *Davis v. United States*, 417 U.S. at 346. Because the Seventh Circuit did not undertake this second step of the analysis, its opinions properly should be cited as jurisdictional, not cognizability holdings.

The Third Circuit, in *United States v. Williams*, 615 F.2d 585 (3d Cir. 1980), did follow the two-step analysis in determining that a violation of Article IV(e) of the IAD is cognizable under 28 U.S.C. § 2255, concluding that such a violation amounts to a fundamental defect. The conclusion in *Williams* is, of course, the opposite conclusion from the one we arrived at in *Mars*, but we continue to believe our conclusion in *Mars* was correct. The *Williams* court could find nothing to warrant treating a claimed IAD error under 28 U.S.C. § 2255 differently than one raised under 28 U.S.C. § 2254, citing its earlier opinion in *Esola v. Grooms*, 520 F.2d 830 (3d Cir. 1975). We note that the Third Circuit has recently held that not all violations of the IAD are "fundamental defects" and thus cognizable under 28 U.S.C. § 2254. *Casper v. Ryan*, 822 F.2d 1283 (3d Cir. 1987).

Because we are persuaded that our holding in *Mars* remains sound, and that a lower standard of cognizability should not be applied to claims brought by a state prisoner pursuant to 28 U.S.C. § 2254, we join the clear majority of the circuits in holding that, in the absence of exceptional circumstances, a claimed violation of Article IV(e) of the IAD is not a funda-

mental defect which is cognizable under 28 U.S.C. § 2254. We therefore affirm the order of the district court.